Supreme Court, U.S.
FILED

091516 JUN 11 2010

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re Guy Heide, Michael A. Kosel, and Duane Taylor, *Petitioners*

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Eighth Circuit, and the Honorable Roger L. Wollman, the Honorable William Jay Riley, and the Honorable Lavenski R. Smith, Judges of the United States Court of Appeals for the Eighth Circuit, *Respondents*

Petition for a Writ of Mandamus

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Michael A. Kosel, appearing *pro se*
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Duane Taylor, appearing *pro se*
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* Lead *pro se* litigant for purposes of service.

Petitioners have a clear right to judicial action on appeal of district court final decision in United States Court of Appeals for the Eighth Circuit. Notwithstanding appellate court's clear and indisputable duty to decide said appeal, appellate court, after taking appellate jurisdiction, improperly refused to exercise its judicial power to decide appeal on the merits. Wherefore petitioners apply for a mandamus to compel inferior appellate court to reinstate the appeal and proceed to adjudicate the same in lawful exercise of its prescribed jurisdiction and in aid of this Court's appellate jurisdiction which might otherwise be defeated.

QUESTION PRESENTED

Whether inferior appellate court's practical abandonment of its prescribed jurisdiction, warrants issuing a mandamus compelling it to exercise its judicial power to decide appeal on the merits and to do that justice which it is legally bound to do.

IDENTIFICATION OF PARTIES AND THEIR RESPECTIVE ROLE

Parties in Appeal Underlying Application for Writ of Mandamus:

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651-454-7440

Michael A. Kosel, Appellant-Plaintiff
889 Bluebill Drive
Mendota Heights, MN 55120
651-456-9512

Duane Taylor, Appellant-Plaintiff
2338 Kressin Avenue
Mendota Heights, MN 55120
651-452-1172

Calvin L. Scovel, Appellee-Defendant
Office of Inspector General
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, D.C. 20590
202-366-1959

Craig S. Singleton, Appellee-Defendant
Office of Inspector General
U.S. Department of Transportation
200 West Adams St. (Suite 300)
Chicago, IL 60606
312-353-0102

PARTIES AGAINST WHOM WRIT IS SOUGHT

Honorable Roger L. Wollman, Circuit Judge
U.S. Court of Appeals for the Eighth Circuit
315 U.S. Courthouse
400 South Phillips Avenue
Sioux Falls, SD 57104
605-330-6680

Honorable William Jay Riley, Circuit Judge
U.S. Court of Appeals for the Eighth Circuit
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza (Suite 4303)
Omaha, NE 68102
402-661-7575

Honorable Lavenski R. Smith, Circuit Judge
U.S. Court of Appeals for the Eighth Circuit
425 West Capitol Avenue
P.O. Box 2340
Little Rock, AK 72201
501-324-7310

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PETITION FOR A WRIT OF MANDAMUS

Come now Guy Heide, Michael A. Kosel and Duane Taylor (hereinafter, "petitioners"), and respectfully petition this Court to issue a writ of mandamus to require the Honorable Roger L. Wollman, the Honorable William Jay Riley, and the Honorable Lavenski R. Smith (hereinafter, "respondents"), Circuit Judges of the Eighth Judicial Circuit, and the other judges and officers of the United States Court of Appeals for the Eighth Circuit, to reinstate *Guy Heide, Michael A. Kosel, and Duane Taylor* v. *Calvin L. Scovel, and Craig S. Singleton, Office of the Inspector General, U.S. Department of Transportation,* Appeal No. 09-1173, and exercise its judicial power to decide the appeal on the merits.

OPINION BELOW

Respondents' opinion in *Guy Heide, Michael A. Kosel, and Duane Taylor* v. *Calvin L. Scovel, and Craig S. Singleton, Office of the Inspector General, U.S. Department of Transportation,* Appeal No. 09-1173, is reported as Appendix A, pp. 2a-4a, *infra*.

ORDERS BELOW

Order entering respondents' opinion, *supra*, as judgment is reported as Appendix B, p. 5a, *infra*. Respondents' order denying motion for clarification of opinion, *supra*, is reported as Appendix C, p. 6a, *infra*. Respondents' order granting petitioners until February 5, 2010, to file petition for rehearing is reported as Appendix D, p. 7a, *infra*. Respondents' or-

der dated March 10, 2010, denying petition for rehearing is reported as Appendix E, p. 8a, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under the All Writs Statute, 28 U.S.C. § 1651 ("[t]he Supreme Court * * * may issue all writs necessary or appropriate in aid of [its] respective jurisdictions and agreeable to the usages and principles of law").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the U.S. Constitution provides "nor [shall any person] be deprived of life, liberty, or property, without due process of law." To secure the right of every individual to claim the protection of that civil liberty, the Congress in 28 U.S.C. § 1291 gave "courts of appeals" exclusive "jurisdiction of appeals from all final decisions of the district courts of the United States," pursuant to U.S. Constitution Article III, Section 1 providing "[t]he judicial Power of the United States, shall be vested in * * * such inferior courts as the Congress may from time to time ordain and establish."

STATEMENT OF FACTS

1. On October 17, 2008, petitioners[1] filed Federal Rules of Civil Procedure Rule 59(c) motion to alter or

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[1] Glossary:

Appellants-Plaintiffs Same as "[p]etitioners," *infra*

amend judgment in district court, after district court had dismissed with prejudice petitioners' complaint in *Guy Heide, Michael A. Kosel, and Duane Taylor v. Calvin L. Scovel, and Craig S. Singleton, Office of the Inspector General, U.S. Department of Transportation* on October 2, 2008.

2. On November 3, 2008, federal defendants filed a response memorandum in opposition to petitioners' Rule 59(e) motion, *supra*. See App. H, *infra*, p. 41a. Federal defendants' opposition did not raise timeliness of petitioners' Rule 59(e) motion as an issue.

3. On November 10, 2008, district court denied petitioners' Rule 59(e) motion, *supra*. See App. H, *infra*, pp. 39a, 41a. District court denial did not raise timeliness of petitioners' Rule 59(e) motion as an issue.

4. On January 9, 2009, petitioners filed notice of appeal. See App. H, *infra*, pp. 39a, 41a. Appellate court took cognizance of petitioners' appeal, issuing a briefing schedule.

Appellate court	United States Court of Appeals for the Eighth Circuit
Appellees-Defendants	Same as "[f]ederal defendants," *infra*
Federal defendants	Calvin L. Scovel, and Craig S. Singleton
Guy Heide, et al.	Same as "[p]etitioners," *infra*
Petitioners	Guy Heide, Michael A. Kosel, and Duane Taylor
Plaintiffs	Same as "[p]etitioners," *supra*
Respondents	Honorable Roger L. Wollman, William Jay Riley, and Lavenski R. Smith

5. Petitioners' opening merits brief, under "Filing Dates," stated district court had entered judgment "October 2, 2008" and petitioners' Rule 59(e) motion, *supra*, "to alter or amend judgment was filed October 17, 2008." See App. H, *infra*, pp. 39a, 41a. Said brief requested "fifteen minutes for oral argument pursuant to Fed. R. App. P. 34(a)[2]." See App. I, *infra*, p. 42a.

6. Federal defendants' merits brief did not raise timeliness of petitioners' district court Rule 59(e) motion, *supra*, as an issue.

7. Petitioners' reply brief did not address any alleged untimeliness of petitioners' district court Rule 59(e) motion, *supra*, inasmuch as federal defendants' merits brief had not raised it as an issue.

8. On third federal work day[3] after receiving petitioners' appeal, respondents dismissed appeal without deciding the appeal on the merits, concluding, without oral argument, that petitioners' "Fed. R. Civ. P. 59(e) motion to alter or amend the judgment was filed more than ten days after the district court's entry of judgment," depriving respondents of juris-

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[2] Federal Rules of Appellate Procedure Rule 34 ("Oral Argument") provides in § (a) that oral argument "must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of [three reasons thereafter recited.]"

[3] Appeal was submitted to respondents Thursday, December 3, 2009. Respondents' opinion was drafted and issued Tuesday, December 8, 2009. See App. A, *infra*, p. 2a.

diction. Respondents' opinion was consistent with petitioners' opening merits brief, *supra*, in stating judgment had been entered in district court on "October 2, 2008." See App. A, *infra*, p. 2a, 3a.

9. Petitioners thereafter moved, *inter alia*, for appellate court memorandum "that clarifies, or elucidates, the predicate record facts upon which its opinion * * * held [petitioners'] 'Rule 59(e) motion [in Minnesota district court] was untimely' ." See App. F, *infra*, p. 21a.

10. Respondents summarily dismissed petitioners' motion for clarification. See App. C, *infra*, p. 6a.

11. After obtaining an extension of time, see App. D, *infra*, p. 7a, petitioners petitioned for rehearing. See App. G, *infra*, pp. 24a-37a.

12. Appellate court denied petition for rehearing. See App. E, *infra*, p. 8a.

REASONS FOR GRANTING THE PETITION

I.

Adequate relief cannot be obtained in any other form or from any other court. Appellate court relied on respondents' opinion to refuse to exercise its judicial power to decide petitioners' appeal on the merits. Since appeal is from district court final decision dismissed with prejudice, see Fact 1, *supra*, petitioners are estopped from re-litigating their complaint against federal defendants again in a court of original jurisdiction. Absent a mandamus from this Court compelling appellate court to do that justice which it is legally bound to do under 28 U.S.C. §

1291, *supra*, federal defendants will never be held accountable for the grievous injuries inflicted on petitioners.

II.

Respondents' opinion has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Following excerpt is the gravamen of respondents' opinion:

> We conclude that plaintiffs' Fed. R. Civ. P. 59(e) motion to alter or amend the judgment was filed more than ten days after the district court's entry of judgment, and therefore did not toll the time for filing the notice of appeal. * * * Because, however, the Rule 59(e) motion was untimely, the district court's November 10, 2008 order denying the motion was a nullity, and this court lacks jurisdiction to review that order.

See Appendix A, p. 3a, *infra*.

Respondents' opinion is on the "briefs of the parties," Appendix B, p. 5a, *infra*, and respondents nowhere dispute the accuracy of the two relevant dates in petitioners' opening merits brief, that district court entered judgment "October 2, 2008," and petitioners' Rule 59(e) motion was filed "October 17, 2008."

Contrary to respondents' unsupported conclusion, *supra*, the Rule 59(e) motion in question here was filed on the tenth day. Federal Rules of Civil Proc-

dure Rule 59(e)[4] then in effect provided any motion to alter or amend judgment must be filed within ten days after entry of judgment. The Federal Rules of Civil Procedure Rule 6 ("Time")[5] then in effect set forth the following formula for computing any period of time prescribed or allowed by the Federal Rules of Civil Procedure. (1) In computing a period of time, the day of the act, event, or default from which the designated period of time began to run was not to be included. (2) The last day of the period so computed was to be included, with exceptions not material here. (3) When the period of time prescribed or allowed was less than 11 days, intermediate Saturdays, Sundays, and legal holidays, including "Columbus Day," were to be excluded.

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[4] Rule 59(e) at the time provided:

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Rule 59(e) was thereafter revised effective December 1, 2009.

[5] Rule 6(a) at the time provided:

(a) In computing any period of time prescribed or allowed by these rules, * * *, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included [with exceptions not material here]. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes * * * Columbus Day, * * *.

Rule 6 was thereafter revised effective December 1, 2009.

Petitioners were entitled to ten days within which to file their Rule 59(e) motion after the district court's entry of judgment on Thursday, October 2, 2008, *supra*. In computing the tenth day, under the then-existing Rule 6, the day of the district court's entry of judgment was to be excluded and also two intermediate Saturdays, two intermediate Sundays, and one intervening legal holiday (Columbus Day[6]). After allowance for the foregoing exclusions, which add five additional days after entry of judgment, the tenth day by rule is clearly Friday, October 17, 2008—the undisputed date on which petitioners filed their Rule 59(e) motion, *supra*.

Since October 17, 2008 is the tenth day from entry of judgment in district court, as time was then computed, petitioners' Rule 59(e) motion was not filed out of time. The inescapable conclusion is that respondents' opinion reflects a lack of mature deliberation, disclosing a *prima facie* case of mistake, misconduct, or omission of duty on the part of the court.

Respondents' bald, conclusory opinion fails to include a scintilla of evidence or a shred of information on which to peg respondents' conclusion, *supra*, that petitioners' Rule 59(e) motion was filed out of time. Nothing in respondents' opinion remotely justifies concluding petitioners filed an untimely Rule 59(e) motion. See Appendix A, pp. 2a-4a, *infra*.

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[6] Respondents may have overlooked or misapprehended the significance of the intervening Columbus Day holiday in arriving at their erroneous conclusion.

Under these circumstances, respondents' opinion constitutes an unauthorized action, functioning here as an obstacle to the exercise of judicial power, employed to justify a refusal to decide appeal on the merits, and correctable by mandamus to secure to petitioners the due process of law intended by Congress in 28 U.S.C. § 1291. Relief by mandamus would be in conformity with writ's function in aid of appellate jurisdiction,[7] *viz.*, "to remove obstacles to appeal" and "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943), four citations omitted. Writ of certiorari to this Court cannot be "perfected," *id.* at 25, until obstacle, *supra*, is vacated, permitting inferior appellate court to exercise its judicial power to decide the cause and do that justice which it is legally bound to do.

III.

If, *arguendo*, petitioners' Rule 59(e) motion was filed out of time, in *Thompson v. I.N.S.*, 375 U.S. 384, 386-387 (1963) the Supreme Court crafted an equitable exception to the strict timing provisions for notic-

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[7] See also *McClellan v. Carland*, 217 U.S. 268 (1910):

> But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.

Id. at 280

es of appeal, known as the "unique circumstances" doctrine. The "unique circumstances" doctrine permits a Court of Appeals to consider a late-filed Rule 59(e) motion in determining appellate jurisdiction. As the Eighth Circuit Court of Appeals explained in *Arnold v. Wood*, 238 F.3d 992 (C.A.8 2001):

> [I]n "unique circumstances" cases, the district court *itself* is unaware of a timing defect. The doctrine rescues an appellant from a district court's error because the appellant ought not to pay the price for the district court's gaffe.

Arnold, at 997 (italic in original).

While, as argued under II, *supra*, petitioners do not concede petitioners' Rule 59(e) motion was filed out of time, if petitioners are mistaken in that belief, the "unique circumstances" doctrine should have rescued their appeal for, in the record, the district court judge did not so much as mention the timeliness of petitioners' Rule 59(e) motion as an issue and accepted petitioners' Rule 59(e) motion as timely filed. See Fact 3, *supra*. The *Arnold* court noted the Eighth Circuit Court of Appeals "must apply the ['special circumstances'] doctrine" until the Supreme Court repudiates *Thompson*. *Arnold*, at 996 (underline supplied).

Respondents, when dismissing petitioners' appeal, clearly abused their discretion in overlooking the "special circumstances" doctrine. This misuse of judicial power is correctable by mandamus. "The writ [of mandamus] is appropriately issued [when] there is usurpation of judicial power or a clear abuse

of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)

IV.

It is settled law that "filing deadlines" in court-prescribed claim-processing rules do not delineate what cases district courts are "competent to adjudicate" and "[o]nly lack of subject matter jurisdiction is preserved post-trial," *Kontrick v. Ryan*, 540 U.S. 443, 454, 459 (2004), and that "failure to object to untimely submissions entails forfeiture of the objections," *Eberhart v. United States*, 546 U.S. 12, 18 (2005).

Federal defendants registered no objection to putative untimely filing of petitioners' Rule 59(e) motion in either district court or merits brief. See Facts 2, 6, *supra*. *Arguendo*, even if petitioners had filed an untimely Rule 59(e) motion, objection thereto had clearly been forfeited, or waived, and could not be made in appellate proceeding. As court of appeals noted in *Anderson v. Beatrice Foods Co.*, 900 F.2d 388 (C.A.1 1990):

> (1) a suitor's first obligation, on pain of waiver, is "to seek any relief that might fairly have been thought available in the district court before seeking it on appeal" [citation omitted]; and (2) that an appellant's brief on appeal fixes "the scope of issues appealed" so that an appellant cannot resurrect an omitted claim "merely by referring to it in a reply brief or at oral argument" [citation omitted].

Id. at 397.

Respondents in their opinion raised the timeliness issue *sua sponte*, citing following case law:

See Huggins v. FedEx Ground Package Sys., Inc., 566 F.3d 771, 773 (8th Cir. 2009) (appellate courts are obligated to consider sua sponte jurisdictional issues where it appears jurisdiction is lacking).

See App. A, *infra*, p. 4a.

Huggins is not material here. *Huggins* turned on whether district court abused its discretion in violating congressional policy that federal courts of appeal only have subject-matter jurisdiction of "final decisions of the district courts of the United States," 28 § 1291, referred to in *Huggins* as "the final-judgment rule."[8] For this reason, *Huggins* does not control here. As explained by this Court in *Kontrick* and *Eberhart*, *supra*, court-prescribed claim-processing rules, such as Rule 59(e), do not delineate subject-matter jurisdiction, and, if an untimely Rule 59(e) motion is not seasonally objected to, that objection is forfeited, without appellate court losing subject-matter jurisdiction of the appeal.

Respondents, in refusing to act for ostensible lack of subject-matter jurisdiction, when subject-matter jurisdiction was clearly unabated, have so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision:

> [T]he writ of mandamus * * * is most frequently invoked for the purpose of setting inferior courts in motion, and to compel them to act where action has been either refused or delayed.

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[8] See petitioners' Motion for Clarification of Judgment and Injunctive Relief, Ex F, *infra*, pp. 19a-21a.

A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition, James L. High (1874) at 123.

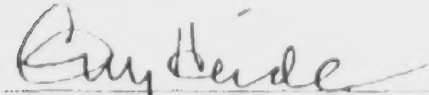
CONCLUSION

For the foregoing reasons, petitioners pray:

1. That a writ of mandamus issue from this Court directed to the Honorable United States Court of Appeals for the Eighth Circuit, and to the Honorable Roger L. Wollman, the Honorable William Jay Riley, and the Honorable Lavenski R. Smith, Circuit Judges of said Court, requiring said Honorable Roger L. Wollman, Honorable William Jay Riley, and Honorable Lavenski R. Smith, to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Roger L. Wollman, Honorable William Jay Riley, and Honorable Lavenski R. Smith, to vacate their opinion of December 8, 2009 dismissing Appeal No. 09-1173 for lack of jurisdiction, and to reinstate the appeal for judicial action on the merits.

2. That petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted June 8, 2010,



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APPENDIX

In re Guy Heide, Michael A. Kosel,
and Duane Taylor, *Petitioners*

APPENDICES

A. Opinion, Honorable Wollman, Riley, and Smith, Circuit Judges, U.S. Court of Appeals, Eighth Circuit, December 8, 2009 2a

B. Order entering opinion, *supra*, as Judgment, Michael E. Gans, Clerk, U.S. Court of Appeals, Eighth Circuit, December 8, 2009 5a

C. Order, Michael E. Gans, Clerk, U.S. Court of Appeals, Eighth Circuit, December 31, 2009 6a

D. Order, Michael E. Gans, Clerk, U.S. Court of Appeals, January 14, 2010 7a

E. Order, Michael E. Gans, Clerk, U.S. Court of Appeals, March 10, 2010 8a

F. Motion for Clarification of Judgment and Injunctive Relief, December 17, 2009, Guy Heide, et al. 9a

G. Petition for Rehearing En Banc, February 4, 2010, Guy Heide, et al. 24a

H. Exhibit 4, Petition for Rehearing En Banc, App. G, Guy Heide, et al. *supra* 38a

I. Introductory p. i, Opening Merits Brief, March 20, 2009, Guy Heide, et al. 42a

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-1173

Guy Heide; Michael A. Kosel; Duane Taylor,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Calvin L. Scovel, Office of the Inspector General, U.S. Department of Transportation; Craig S. Singleton, Office of the Inspector General, U.S. Department of Transportation,	*	[UNPUBLISHED]
Appellees.	*	

Submitted: December 3, 2009
Filed: December 8, 2009

Before WOLLMAN, RILEY, and SMITH, Circuit Judges.

PER CURIAM.

Guy Heide, Michael Kosel, and Duane Taylor (plaintiffs) appeal following the district court's[1] order dismissing their civil action and the court's denial of their post-judgment motion. We conclude that plaintiffs' Fed. R. Civ. P. 59(e) motion to alter or amend the judgment was filed more than ten days after the district court's entry of judgment, and therefore did not toll the time for filing the notice of appeal. See Fed. R. App. P. 4(a)(4)(A) (stating as relevant that time to appeal runs from disposition of timely Rule 59(e) motion or from Rule 60 motion filed within 10 days of entry of judgment); cf. Sanders v. Clemco Indus., 862 F.2d 161, 169 (8th Cir. 1988) (motion for reconsideration filed more than 10 days following entry of judgment does not toll time for appeal). Thus, plaintiffs' January 9, 2009 notice of appeal was timely only as to the November 10, 2008 order denying the motion to reopen, but not as to the underlying October 2, 2008 judgment. See Fed. R. App. 4(a)(1)(A) (notice of appeal must be filed within 30 days of entry of judgment or order from which appeal is taken). Because, however, the Rule 59(e) motion was untimely, the district court's November 10, 2008 order denying the motion was a nullity, and this court lacks jurisdiction to review that order. See Sanders, 862 F.2d at 168 (if motion characterized as Rule 59(e) motion is untimely made, court loses ju-

[1] The Honorable Michael J. Davis, Chief Judge, United States District Court for the District of Minnesota.

risdiction over motion and any ruling on it becomes nullity); see also Arnold v. Wood, 238 F.3d 992, 998 (8th Cir. 2001) (this court lacked jurisdiction to review district court's decision on untimely Rule 59(e) motion). Accordingly, we dismiss the appeal for lack of jurisdiction and denying all pending motions as moot. See Huggins v. FedEx Ground Package Sys., Inc., 566 F.3d 771, 773 (8th Cir. 2009) (appellate courts are obligated to consider sua sponte jurisdictional issues where it appears jurisdiction is lacking).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1173

Guy Heide; Michael A. Kosel; Duane Taylor,
Plaintiffs – Appellants,
v.
Calvin L. Scovel, Office of the Inspector General,
U.S. Department of Transportation;
Craig S. Singleton, Office of the Inspector General,
U.S. Department of Transportation,
Defendants – Appellees

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(0:08-cv-00727-MJD)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed for lack of jurisdiction in accordance with the opinion of this Court.

December 08, 2009

Order Entered in Accordance with Opinion;
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1173

Guy Heide, et al.,
Appellants,

v.

Calvin L. Scovel, Office of the Inspector General,
U.S. Department of Transportation and
Craig S. Singleton, Office of the Inspector General,
U.S. Department of Transportation,
Appellees

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(0:08-cv-00727 MJD)

ORDER

Appellants' motion for clarification has been considered by the court and is denied.

December 31, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1173

Guy Heide, et al.,
Appellants,

v.

Calvin L. Scovel, Office of the Inspector General,
U.S. Department of Transportation and
Craig S. Singleton, Office of the Inspector General,
U.S. Department of Transportation,
Appellees

Appeal from U.S. District Court for the
District of Minnesota - Minneapolis
(0:08-cv-00727-MJD)

ORDER

The motion of the appellants for a 14-day extension of time, until February 5, 2010, to file a petition for rehearing is granted.

Petitions for rehearing and rehearing en banc must be received in the clerk's office on the due date. No grace period for mailing is allowed and the date of the postmark is irrelevant.

January 14, 2010

Order Entered Under Rule 27(B)(a);
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1173

Guy Heide, et al.,
Appellants,

v.

Calvin L. Scovel, Office of the Inspector General,
U.S. Department of Transportation and
Craig S. Singleton, Office of the Inspector General,
U.S. Department of Transportation,
Appellees

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(0:08-cv-00727-MJD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 10, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 09-1173

Guy Heide, Michael A. Kosel, and Duane Taylor
Appellants-Plaintiffs,
v.
Calvin L. Scovel, and Craig S. Singleton
of the Office of Inspector General,
U.S. Department of Transportation
Appellees-Defendants.

APPEAL FROM A MEMORANDUM OF LAW &
ORDER ENTERED AS JUDGMENT
IN A CIVIL CASE

APPELLANTS-PLAINTIFFS' MOTION
FOR CLARIFICATION OF JUDGMENT AND
INJUNCTIVE RELIEF

Pursuant to Rules 40(a) and 26(b) of the Federal Rules of Appellate Procedure, Guy Heide, Michael A. Kosel, and Duane Taylor (hereinafter "injured parties"[2]), non-CM/ECF participants filing *pro se*, ap-

[2] The following references are used herein pursuant to Fed. R. App. P. 28(d):

appellants-plaintiffs	same as "injured parties" *infra*
appellees-defendants	same as "federal defendants" *infra*

proach and show the Court a special circumstance, *viz.*, an opinion from this Court, entered as judgment, which does not give the record facts supporting its holding. The injured parties argue this special circumstance warrants granting clarification of judgment and injunctive relief, described more fully in Statement of Relief Sought *infra*, on the grounds this special circumstance constitutes an effective denial of the injured parties' Fifth Amendment "due process of law" right to petition for panel rehearing.

FACTUAL BACKGROUND

In the record of the appeal *sub judice*, the injured parties filed a Federal Rules of Civil Procedure Rule 59(e) motion in Minnesota district court.

The Court[3] issued its opinion on December 8, 2009, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], which opinion is entered as judgment. Ex. 2 *infra* [now see App. B, *supra*, p. 5a]. The opinion holds that the injured parties' "Rule 59(e) motion [in Minnesota district court] was untimely," concludes the Minnesota district court's November 10, 2008 order

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federal defendants	Calvin L. Scovel and Craig S. Singleton, Office of Inspector General U.S. Department of Transportation
injured parties	Guy Heide, Michael A. Kosel and Duane Taylor.

[3] A screening panel consisting of the Honorable Roger L. Wollman, Honorable William Jay Riley and Honorable Lavenski R. Smith.

denying the Rule 59(e) motion is a nullity, and this Court therefore lacks jurisdiction to review that Minnesota district court order, and dismisses the appeal *sub judice* "for lack of jurisdiction and denying all pending motions as moot." Ex. 1 *infra* at 2 of 3 [now see App. A, *supra*, p. 4a].

The asserted procedural oversight, filing an untimely Rule 59(e) motion, is raised for the first time by the Court in its December 8, 2009 opinion, more than one year after the injured parties filed their Rule 59(e) motion in Minnesota district court.

In the record, the Minnesota district court considered this Rule 59(e) motion as timely filed and the appellees-defendants (hereinafter, "federal defendants") also did not raise the timely filing of this Rule 59(e) motion heretofore as an issue.

POINTS OF LAW

The Fifth Amendment right to "due process of law" is a fundamental, constitutional guarantee that all legal proceedings will be fair and that parties will be given notice of the proceedings and an opportunity to be heard, and that the law shall not be unreasonable, arbitrary, or capricious. The Fifth Amendment right to "due process of law" consists of procedural due process and substantive due process.

In *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), the Supreme Court held procedural due process fundamentally requires "notice" reasonably calculated to afford "an opportunity to present * * * objections" and "must be of such nature as reasonably to convey the required information," noting

"process which is a mere gesture is not due process." *Id.* at 314-315.

In *Lee* v. *Kemna*, 534 U.S. 362 (2002), the Supreme Court held that a court's unreasonable refusal to grant a short continuance of one or two days, based on a judge's personal conflicts and a conflict with another trial, violated a party's substantive due process rights, for said refusal "stated a reason that could not have been countered by a perfect motion for continuance." *Id.* at 381.

The injured parties have a statutory right to an appeal conducted "by the rules" of this Court. 28 U.S.C. § 1654. This due process right self-evidently includes Federal Rules of Appellate Procedure Rule 40 ("Petition for Panel Rehearing") and Rule 26 ("Computing and Extending Time"). Rule 40 specifically provides, in § (a)(1), that the time to file a petition for panel rehearing may be extended from "45 days after entry of judgment" by an order of this Court and, in § (a)(2), requires that a petition for panel rehearing "must state with particularity each * * * fact" which a petitioner believes this Court "has overlooked or misapprehended." Rule 26 provides, in § (b), that this Court may for "good cause" extend the time prescribed by the Rules to perform any act, which reasonably includes the act of filing a petition for panel rehearing.

ARGUMENT

The injured parties contend dismissing the appeal *sub judice* with an opinion which fails to state the

predicate record facts necessary to discern the Court's path to its holding[4] is unreasonable, inadequate, fundamentally unfair legal process—a denial of their Fifth Amendment right to "due process of law" *supra*. And, they contend this circumstance is sufficient "good cause," under Rule 26 *supra*, to ex-

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[4] In *Securities Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947), the Supreme Court emphasized government agencies must state the basis for their decisions "with such clarity as to be understandable," adding a court should not be "compelled to guess" on the grounds for decision. *Id.* at 196-197, underline supplied.

In *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962), the Supreme Court held an agency must make decisions "supported by substantial evidence," decisions which articulate a rational connection "between the facts found and the choice made." *Id.* at 168, citations omitted, underline supplied.

While the subject matter in *Chenery* and *Burlington* differs from the appeal *sub judice*, these substantive precedents are arguably on point as to the guidelines to be followed in preparing government decisions. If government agencies, under *Chenery* and *Burlington supra*, must make clear ("with such clarity as to be understandable") decisions, based on evidence to which the reader should not be "compelled to guess," stating the "facts," it reasonably follows these guidelines should, *a fortiori*, be incumbent on courts drafting an opinion to be entered as judgment.

The injured parties argue the Court's opinion in the appeal *sub judice* falls short of the reasonable guidelines in *Chenery* and *Burlington supra*. Conspicuously absent from the Court's spare opinion, Ex. 1 *infra*, is factual record evidence supporting its holding.

tend the time to petition for panel rehearing to remedy the circumstance.

I.

The injured parties argue the Court's spare opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], deprives them of the Fifth Amendment right to "due process of law" *supra*. Applying the *Mullane* principles *supra* to the appeal *sub judice*, for this opinion to comport with "due process of law," it must convey "the required information" necessary for the injured parties to "present [their] objections." *Ibid.*, underline supplied. Here the Court presents the injured parties with an opinion entered as judgment, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], that is bereft of the record facts supporting its holding. *Ipso facto*, the opinion fails to state the "facts" which this Court may have "misapprehended," and effectively makes it impossibly difficult to discern facts this Court may have "overlooked," both of which factual contentions "must" be argued for a petition for panel rehearing to succeed, see Rule 40(a)(2) *supra*.

The injured parties contend it is fundamentally unfair to give inadequate notice of the information required to submit an adequate petition for panel rehearing. The Court's failure to present the factual reasons for their opinion arguably constitutes denial of "due process of law," within the *Mullane* principles *supra*, for the injured parties have not received "the required information" necessary to adequately "present [their] objections" in a petition for panel rehearing. *Ibid.*

II.

The injured parties argue the Court's spare opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], deprives them of the Fifth Amendment right to substantive due process, by placing them in the same situation as the defendant in *Lee supra*, who was presented with judicial reasoning "that could not have been countered by a perfect motion for continuance." *Ibid.*, underline supplied.

Here, under Rule 40(a)(2) *supra*, the injured parties "must" submit a petition for panel rehearing that argues "with particularity each * * * fact" they believe "the court has overlooked or misapprehended," underline supplied. But, how can the injured parties argue this Court has "overlooked or misapprehended" facts, when the Court's opinion does not state the predicate record facts relied on to its holding? The injured parties argue they have been presented with an opinion entered as judgment, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], which does not permit "perfect[ing]" an adequate petition for panel rehearing under Rule 40(a)(2), within the *Lee* principles *supra*.

Put another way, the Court's opinion constitutes denial of the injured parties' Fifth Amendment right to substantive due process for being an opinion so spare on the facts as to effectively deny the injured parties a reasonable opportunity to "counter[]" with an adequate petition for panel rehearing under Rule 40(a)(2), within the *Lee* principles *supra*.

III.

The opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], cites *Sanders v. Clemco Industries*, 862 F.2d 161 (C.A.8 1988) at 169, as support for the proposition "motion for reconsideration filed more than 10 days following entry of judgment does not toll time for appeal." *Id.* at 2 [now see App., *supra*, 3a].

Sanders turned on how the appellate court construed Sanders' self-styled motion for reconsideration. *Id.* at 166. If *Sanders* supports anything, it supports the proposition "self-styled" motions for reconsideration are "hazards" to the moving party, since that motion "is not described by any particular rule of federal civil procedure," forcing courts to "guess" whether it should be characterized as filed under Rule 59(e) or Rule 60(b). *Id.* at 168-169. The *Sanders* court decided, given this circumstance, district court had not abused its discretion in denying Sanders' motion under Rule 60(b). *Id.* at 169. All the foregoing facts differentiate *Sanders* from the appeal *sub judice*, where the Court's opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], acknowledges the injured parties' motion was filed under Rule 59(e) *ab initio*.

The substance of the *Sanders* opinion also differentiates *Sanders* from the appeal *sub judice*, for the *Sanders* opinion thoughtfully set forth the predicate record facts, *viz.*, the dates and circumstances, from which the *Sanders* court reasonably concluded Sanders' motion, if construed as a Federal Rules of Civil

Procedure Rule 59(e) motion, was "untimely made, beyond the ten-day period":

> The district court then granted the motions for summary judgment in a unitary Memorandum and Order dated November 6, 1987. On December 7, 1987, within thirty days of the summary judgment order, Sanders filed a motion "For Reconsideration and To Set Aside Summary Judgment." Sanders did not specify under which rule of civil procedure he filed this motion.

Id. at 168, 166. By presenting the reasons considered by the *Sanders* court, this opinion afforded Sanders an adequate, reasonable, and fair opportunity to petition for panel rehearing—if Sanders, after reading the opinion, believed the *Sanders* court had "overlooked" or "misapprehended" a fact. Rule 40(a)(2) *supra.*

Stated another way, the *Sanders* opinion permitted Sanders to follow the procedure prescribed in Rule 40(a)(2) *supra.* In the appeal *sub judice,* however, the injured parties are unable to argue with "particularity" in a petition for panel rehearing that this Court "overlooked" or "misapprehended" a fact, Rule 40(a)(2) *supra,* for the facts supporting its holding are not presented for argument. See Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a].

IV.

The Court's opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], also cites *Arnold v. Wood,* 238 F.3d

992 (C.A.8 2001) at 998, as support for the proposition "this court lacked jurisdiction to review district court's decision on untimely Rule 59(e) motion." *Id.* at 2 [now see App. A, *supra*, p. 4a].

Arnold turned, in part, on whether Arnold had filed a timely Rule 59(e) motion. In *Arnold* the defendants argued Arnold had filed an untimely Rule 59(e) motion, and Arnold was unable to satisfy the court with "reliable evidence to the contrary." *Id.* at 995. Since the district court had "fully appreciated" that Arnold's Rule 59(e) motion was untimely, the *Arnold* court held Arnold did not qualify for the "unique circumstances" doctrine crafted by the Supreme Court as "an equitable exception to the strict timing provisions for notices of appeal." *Id.* at 996-997. The foregoing facts substantively differentiate *Arnold* from the appeal *sub judice*, in which the Minnesota district court considered the injured parties' Rule 59(e) motion as timely filed and the federal defendants also did not raise the timely filing of this Rule 59(e) motion as an issue. For these substantive reasons, the injured parties argue *Arnold* is not analogous to the appeal *sub judice*.

The injured parties do not dispute *Arnold* supports dismissal when record facts, analogous to the record facts in *Arnold*, provide the necessary evidentiary support for concluding an untimely Rule 59(e) motion denies jurisdiction. However, as particularized *supra*, since the factual predicate in *Arnold* substantively departs from the appeal *sub judice*, *Arnold* arguably does not support the Court's spare opinion in this appeal, Ex. 1 *infra* [now see App. A,

supra, pp. 2a-4a], which fails to make a case that the Rule 59(e) motion in the appeal *sub judice* is apposite to the Rule 59(e) motion in *Arnold supra*.

V.

The opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], cites *Huggins v. Fedex Ground Package System, Inc.*, 566 F.3d 771 (C.A.8 2009) at 773, as support for the proposition "appellate courts are obligated to consider sua sponte jurisdictional issues where it appears jurisdiction is lacking." *Id.* at 2 [now see App., *supra*, 4a].

Huggins turned on whether the district court abused its discretion under Federal Rules of Civil Procedure Rule 54(b). *Id.* at 773. *Huggins* involved a vehicular accident with multiple parties. *Id.* at 773. The *Huggins* opinion, like the *Sanders* opinion *supra*, clearly and thoughtfully set forth the predicate record facts from which the *Huggins* court reasonably concluded the district court had abused its discretion, stating, *inter alia*:

> Mr. Huggins and the remaining defendant, Swanston Equipment Company, then filed a motion to certify the summary judgment rulings as final judgments under Fed.R.Civ.P. 54(b), and the court granted the motion. * * * Mr. Huggins was a passenger in a tractor-trailer driven by someone who he alleged was a FedEx employee when the accident occurred. * * * As the Teton driver topped a hill, he immediately saw a Swanston

> truck in front of him on the left shoulder, perhaps slightly into his lane; * * * [t]he Teton driver slowed and eventually stopped behind another vehicle. Shortly afterward, the FedEx vehicle ran into the back of the Teton tractor-trailer, resulting in Mr. Huggins's injuries. * * * Here the district court entered a final judgment in favor of fewer than all parties * * * [failing] to distinguish Mr. Huggins's case * * * . * * * [P]ermitting appeals before final judgment causes delay, expense, and duplication of appellate process * * * [no] special circumstances exist in this case to indicate that * * * the final-judgment rule [should not] be respected here. * * * We therefore conclude that the district court abused its discretion in designating its orders granting summary judgment to FedEx and Teton as final judgments under Rule 54(b) and dismiss the appeal for lack of jurisdiction.

Id. at 773-775, quotation indent, citation omitted.

The foregoing substantive facts differentiate *Huggins* from the appeal *sub judice*, in which this Court could not reasonably find Minnesota district court abused its discretion under Rule 54(b). For this substantive reason, the injured parties argue *Huggins* is not analogous to the appeal *sub judice*.

The injured parties do not dispute *Huggins* supports courts considering jurisdictional issues *sua sponte*, but argue *Huggins* supports doing so only in the context of providing an opinion that presents the predicate record facts from which it appears jurisdic-

tion is in fact lacking. In the appeal *sub judice*, the Court's spare opinion, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], fails to present the factual reasons, *viz*., the dates and circumstances, from which it appears to this Court that the injured parties' Rule 59(e) motion in Minnesota district court was untimely and, for that reason, *Huggins* arguably does not support the judgment given in the appeal *sub judice*.

STATEMENT OF RELIEF SOUGHT

1. A memorandum from the Court that clarifies, or elucidates, the predicate record facts upon which its opinion entered as judgment, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], held the injured parties' "Rule 59(e) motion [in Minnesota district court] was untimely";

2. An order extending the time to petition for panel rehearing to 45 days from issuance of the Court memorandum requested *supra*.

REASONS WHY REQUESTED RELIEF SHOULD ISSUE

The injured parties assert something is fundamentally wrong when a court has the necessary information, but the party preparing to petition for panel rehearing does not have the information necessary to perfect a petition for panel rehearing. The risk of unfair bias—whether conscious or unconscious—is obvious.

The injured parties clearly have a right, which the law presumes they did not intend to waive, to demand that the Court should, at all times, and in

respect of every matter committed to its discretion, afford the injured parties their Fifth Amendment right to "due process of law," within the *Mullane* and *Lee* principles *supra*. For the foregoing reasons, the Court's exceedingly spare opinion entered as judgment, Ex. 1 *infra* [now see App. A, *supra*, pp. 2a-4a], is arguably "a mere gesture" and "not due process," *Mullane supra*.

The requested equitable relief *supra* is necessary to remedy a denial of the injured parties' Fifth Amendment right to "due process of law," for the reason relief at law is inadequate. "[E]very right, when withheld, must have a remedy." *Marbury v. Madison*, 1 Cranch 137, 163 (1803), internal quotation marks and citation omitted.

CONCLUSION

WHEREFORE the injured parties respectfully move that the Court grant APPELLANTS-PLAINTIFFS' MOTION FOR CLARIFICATION OF JUDGMENT AND INJUNCTIVE RELIEF.

Dated: December 17, 2009.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 09-1173

Guy Heide, Michael A. Kosel, and Duane Taylor
Appellants-Plaintiffs,

v.

Calvin L. Scovel, and Craig S. Singleton
of the Office of Inspector General,
U.S. Department of Transportation
Appellees-Defendants.

APPEAL FROM A MEMORANDUM OF LAW &
ORDER ENTERED AS JUDGMENT
IN A CIVIL CASE

APPELLANTS-PLAINTIFFS' PETITION
FOR REHEARING EN BANC

The panel decision conflicts with the following decisions of the United States Supreme Court:

Question 1, *infra*:	*Thompson v. I.N.S.*, 375 U.S. 384 (1963);
Question 3, *infra*:	*Lee v. Kemna*, 534 U.S. 362 (2002);
Question 4, *infra*:	*Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950); *In re Oliver*, 333 U.S. 257, 273 (1948);

Castro v. United States, 540 U.S. 375, 330 (2003);
Butz v. Economou, 438 U.S. 478 (1978);

and the following decision of the U.S. Court of Appeals for the Eighth Circuit:

Question 1, *infra*: *Arnold v. Wood*, 238 F.3d 992 (C.A.8 2001);

and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

QUESTIONS PRESENTED

Although the merits brief filed by Guy Heide, Michael A. Kosel, and Duane Taylor (hereinafter, "petitioners") represented that their Rule 59(e) motion was timely filed, and notwithstanding the fact that neither the district court trial judge nor appellees-defendants so much as mentioned the timeliness of petitioners' Rule 59(e) motion as an issue, the panel, in a secret proceeding held without notice, concluded otherwise:

> We conclude that plaintiffs' Fed. R. Civ. P. 59(e) motion to alter or amend the judgment was filed more than ten days after the district court's entry of judgment, and therefore did not toll the time for filing the notice of appeal. * * * Because, however, the Rule 59(e) motion was untimely, the district court's November 10, 2008 order denying the motion was a nullity, and this court lacks jurisdiction to review that order.

Ex. 2, Addendum pp. 2-3 [now see App. A, *supra*, pp. 2a-4a]. Since the panel decision, *supra*, did not include the dispositive facts to decision, the petitioners filed a post-judgment motion for clarification of judgment, which motion was summarily dismissed without explanation. The questions presented are:

1. Whether the panel decision conflicts with *Thompson v. I.N.S.*, 375 U.S. 384 (1963) and *Arnold v. Wood*, 238 F.3d 992 (C.A.8 2001).
2. Whether the panel presumptively erred when computing the ten days after entry of judgment allowed for filing under the then-existing Rule 59(e).
3. Whether the panel decision denied the petitioners substantive due process of law, within the principles announced in *Lee v. Kemna*, 534 U.S. 362 (2002), when dismissing their appeal without disclosing the dispositive facts relied on to decision.
4. Whether the panel decision, reached in a final, secret proceeding held without due notice, denied the petitioners due process of law within the principles announced in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), *inter alia*.

STATEMENT

In the record, the appellees-defendants have not raised the timeliness of petitioners' Rule 59(e) motion, *supra*, as a concern.

The panel decision, *supra*, does not dispute the accuracy of the following filing dates conspicuously apparent on the record in petitioners' merits brief:

> Judgment [in district court] was entered October 2, 2008. A timely [Rule 59(e)] motion to alter or amend judgment was filed October 17, 2008, which motion was denied November 10, 2008. A timely notice of appeal was filed January 9, 2009.

Ex. 4, Addendum pp. 6-7, *infra* [now see App. H, *infra*, p. 39a] (underline supplied).

> Clerk of District Court entered * * * judgment October 2, 2008.
>
> [The petitioners] filed [Rule 59(e)] motion to alter or amend judgment October 17, 2008.

Ex. 4, Addendum p. 8, *infra* [now see App. H, *infra*, p. 41a] (underline supplied).

The panel summarily dismissed petitioners' post-judgment motion for clarification of judgment with a one-sentence denial that failed to illuminate the dispositive facts to the panel decision, *supra*. Ex. 3, Addendum p. 4 [now see App. C, *supra*, p. 6a].

ARGUMENT

I.

Whether the panel decision conflicts with *Thompson v. I.N.S.*, 375 U.S. 384 (1963) and *Arnold v. Wood*, 238 F.3d 992 (C.A.8 2001):

In *Thompson v. I.N.S.*, 375 U.S. 384, 386-387 (1963) the Supreme Court crafted an equitable exception to the strict timing provisions for notices of appeal, which exception has come to be known as the "unique circumstances" doctrine. The "unique circumstances" doctrine permits a Court of Appeals to consider a late-filed Rule 59(e) motion in determining appellate jurisdiction. As the Eighth Circuit Court of Appeals explained in *Arnold v. Wood*, 238 F.3d 992 (C.A.8 2001):

> [I]n "unique circumstances" cases, the district court *itself* is unaware of a timing defect. The doctrine rescues an appellant from a district court's error because the appellant ought not to pay the price for the district court's gaffe.

Arnold, at 997 (italic in original).

While, as argued under Question 2, *infra*, petitioners do not concede their Rule 59(e) was filed out of time, petitioners also argue that, even if petitioners are mistaken in that belief, the "unique circumstances" doctrine should have rescued their appeal for, in the record, the district court judge did not so much as mention the timeliness of petitioners' Rule 59(e) motion as an issue and accepted petitioners' Rule 59(e) motion as timely filed. The *Arnold* court noted the Eighth Circuit Court of Appeals "must apply the ['special circumstances'] doctrine" until the Supreme Court repudiates *Thompson*. *Arnold*, at 996 (underline supplied).

The panel decision, *supra*, clearly overlooked or misapprehended the "special circumstances" doctrine

when dismissing petitioners' appeal for want of appellate jurisdiction, *supra*.

For the foregoing reasons, the petitioners respectfully request that the *en banc* panel vacate the panel decision for conflicting with the decision of the Supreme Court in *Thompson*, *supra*, and with the decision of the Eighth Circuit Court of Appeals in *Arnold*, *supra*, and rehear the appeal so that the petitioners' appeal may be heard on the merits.

2.

Whether the panel presumptively erred when computing the ten days after entry of judgment allowed for filing under the then-existing Rule 59(e):

The Federal Rules of Civil Procedure Rule 59(e) in effect before December 1, 2009 provided that any motion to alter or amend judgment must be filed within ten days after entry of judgment. The Federal Rules of Civil Procedure Rule 6 ("Time") then in effect set forth the following formula for computing any period of time prescribed or allowed by the Federal Rules of Civil Procedure. (1) In computing a period of time, the day of the act, event, or default from which the designated period of time began to run was not to be included. (2) The last day of the period so computed was to be included, with exceptions not material here. (3) When the period of time prescribed or allowed was less than 11 days, intermediate Saturdays, Sundays, and legal holidays, including "Columbus Day," were to be excluded in the computation.

Petitioners were entitled to ten days within which to file their Rule 59(e) motion after the district court's entry of judgment on Thursday, October 2, 2008, *supra*. In computing the tenth day, under the then-existing Rule 6, *supra*, the day of the district court's entry of judgment was to be excluded and also two intermediate Saturdays, two intermediate Sundays, and one intervening legal holiday (Columbus Day[5]). After allowance for the foregoing exclusions, which add five additional days after entry of judgment, the tenth day by rule is clearly Friday, October 17, 2008—the undisputed date on which petitioners filed their Rule 59(e) motion, *supra*.

Since October 17, 2008 is the tenth day from entry of judgment in district court, as time was then computed under Rules 59(e) and 6 of the Federal Rules of Civil Procedure, petitioners' Rule 59(e) motion was not filed out of time. The inescapable conclusion is that the panel presumptively erred in concluding, *supra*, that petitioners' Rule 59(e) motion was outside the ten days allowed by the then-existing Rule 6, *supra*, after the district court's entry of judgment on October 2, 2008.

For undisclosed reasons, the panel decision, *supra*, ignores the Rule 59(e) motion's filing date reported in petitioners' merits brief, *supra*, October 17, 2008, by failing even to acknowledge its existence and fails to include how the panel computed time in

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[5] The panel may have overlooked or misapprehended the significance of the intervening Columbus Day holiday in arriving at their erroneous conclusion.

reaching decision. The panel decision fails to include a scintilla of evidence or a shred of information on which to peg the panel decision, *supra*, that petitioners' Rule 59(e) motion was filed out of time. Nothing in the panel decision could remotely justify concluding petitioners filed an untimely Rule 59(e) motion. See Ex. 2, Addendum pp. 2-3, *infra* [now see App. A, *supra*, pp. 2a-4a].

For the foregoing reason, the petitioners respectfully request that the *en banc* panel vacate the panel decision for plain error incident to the panel's presumptive computation of time necessary to panel decision, *supra*, and rehear the appeal so that the petitioners' appeal may be heard on the merits.

3.

Whether the panel decision denied the petitioners substantive due process of law, within the principles announced in *Lee v. Kemna*, 534 U.S. 362 (2002), when dismissing their appeal without disclosing the dispositive facts relied on to decision:

The panel decision dismissing petitioners' appeal with a decision which fails to disclose the dispositive facts necessary to discern the panel's path to decision is arguably unreasonable, fundamentally unfair process—a denial of petitioners' Fifth Amendment right to substantive "due process of law."

A somewhat similar situation was considered by the Supreme Court, on *certiorari* to the United States Court of Appeals for the Eighth Circuit, in *Lee v. Kemna*, 534 U.S. 362 (2002) (judgment vacated,

case remanded). In *Lee*, the Supreme Court held that an eighth circuit court's unreasonable refusal to grant a short continuance of one or two days, based on a judge's personal conflicts and a conflict with another trial, violated Lee's substantive due process rights, for said refusal "stated a reason that could not have been countered by a perfect motion for continuance." *Id.* at 381, underline supplied. Here, the petitioners argue that the panel, in presenting the petitioners with a decision bereft of the dispositive facts relied on by the panel in extinguishing petitioners' statutory appeal rights, places petitioners in the same situation as the defendant in *Lee*, *supra*, who was similarly presented with judicial reasoning "that could not have been countered by a perfect motion for continuance." *Ibid.*, underline supplied.

The petitioners have a steep hill to climb on a petition for rehearing. To prevail the petitioners "must," under Rule 40(a)(2) of the Federal Rules of Appellate Procedure, submit a petition that argues with "particularity" each "fact" the petitioners believe the panel "overlooked or misapprehended." But, how can petitioners reasonably prepare an adequate Rule 40(a)(2) petition, when the panel withholds the dispositive facts to its decision, see Ex. 2, Addendum pp. 2-3, *infra* [now see App. A, *supra*, pp. 2a-4a], and refuses to break the secrecy and disclose said facts on motion for clarification of judgment? See Statement, *supra*; Ex. 3, Addendum p. 4, *infra* [now see App. C, *supra*, p. 6a]. The petitioners argue that they, like the defendant in *Lee*, *supra*, have been presented with a panel decision, which does

not permit "perfect[ing]" an adequate petition for rehearing under Rule 40(a)(2), *supra*, for the dispositive facts which must be argued with "particularity" under that rule have not been disclosed to the petitioners.

Put another way, the panel's exceedingly spare opinion constitutes denial of the petitioners' Fifth Amendment right to substantive due process, for being so spare on the dispositive facts as to effectively deny the injured parties a reasonable, fair opportunity to "counter[ ]," *Lee*, *supra*, the spare panel decision with an adequate petition for panel rehearing under Rule 40(a)(2), *supra*.

The petitioners have a right, which the law presumes they did not intend to waive, to demand that the panel should, at all times, and in respect of every matter committed to its discretion, afford the petitioners their Fifth Amendment right to substantive "due process of law," within the *Lee* principles, *supra*. The petitioners argue something is fundamentally wrong when a panel has the necessary information, but the party preparing to petition for rehearing does not have the information necessary to perfect a petition for rehearing under Rule 40(a)(2), *supra*. The risk of unfair bias—whether conscious or unconscious—is obvious.

The panel arguably overlooked or misapprehended petitioners' Fifth Amendment right to substantive "due process of law" within the commonsense principles announced in *Lee*, *supra*. The panel decision, Ex. 2, Addendum pp. 2-3, *infra* [now see App. A, *supra*, pp. 2a-4a], is arguably so arbitrary

and devoid of reasonable basis that it can be called a deprivation of liberty or property without due process of law.

For the foregoing reason, the petitioners respectfully request that the *en banc* panel vacate the panel decision for conflicting with the decision of the Supreme Court in *Lee*, *supra*, and rehear the appeal so that petitioners' appeal may be heard on the merits. "[E]very right, when withheld, must have a remedy." *Marbury v. Madison*, 1 Cranch 137, 163 (1803), internal quotation marks, citation omitted.

4.

Whether the panel decision, reached in a final, secret proceeding held without due notice, denied the petitioners due process of law within the principles announced in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), *inter alia*:

The Fifth Amendment right to "due process of law" is a fundamental, constitutional guarantee that all legal proceedings will be fair, that parties will be given notice of the proceedings and an opportunity to be heard, and that the law shall not be unreasonable, arbitrary, or capricious. The Supreme Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950) held "elementary and fundamental" that due process in a final proceeding requires "notice" reasonably calculated to afford "an opportunity to present * * * objections," and that "process which is a mere gesture is not due process." *Id.* at 314-315.

The panel's procedure, or lack of procedure, in extinguishing the petitioners' statutory appeal rights, on a dispositive question arising for the first time in the Eighth Circuit Court of Appeals, was arguably fundamentally unfair and a denial of petitioners' Fifth Amendment right to "due process of law." Here, the panel gave the petitioners no notice of the new, potentially dispositive, legal issue, *viz.*, the purported untimeliness of the petitioners' Rule 59(e) district court motion, rushing instead to judgment in a final, secret proceeding without due notice.

Due process of law is rooted in "this nation's historic distrust of secret proceedings [and] their inherent dangers to freedom." *In re Oliver*, 333 U.S. 257, 273 (1948). The *Oliver* court held "[i]t would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting." *Oliver*, at 284-285 (all underline supplied). Is this not what has happened here? Here, the panel has extinguished the petitioners' statutory appeal rights without affording the petitioners due notice and an adequate opportunity to defend against the new, potentially dispositive, legal issue, *supra*, apparently raised *sua sponte* by the panel itself in a secret, final proceeding. This fundamentally unfair procedure, or lack of procedure, clearly violates the *Oliver* court's affirmation of the well-settled holding:

> It is "the law of the land" that no man's life, liberty or property be forfeited as a punishment until

> there has been a charge fairly made and fairly tried in a public tribunal.

Oliver, at 278 (citation omitted, all underline supplied).

In addition to the prejudice inherent in secret, final proceedings without due notice, the abandonment of the adversarial process to decision was also arguably fundamentally unfair and a denial of due process. The adversarial process in federal courts "ordinarily" includes "notice" so that adverse parties can approach the court with argument that "crystallizes the pertinent issues * * * creating a more complete record of the case." *Castro v. United States*, 540 U.S. 375, 330 (2003). The adversarial process is arguably a prerequisite to a fair proceeding. As the Supreme Court held in *Butz v. Economou*, 438 U.S. 478 (1978), "the adversary nature of the [judicial] process" is intended to serve as a check "on malicious action by judges." *Butz*, at 512. The abandonment of the adversarial process to panel decision in this matter clearly conflicts with the principles announced in *Castro* and *Butz*, *supra*.

For the foregoing reasons, the petitioners respectfully request that the *en banc* panel vacate the panel decision for conflicting with the decisions of the Supreme Court in *Mullane*, *Oliver*, *Castro*, and *Butz*, *supra*, and rehear the appeal so that the petitioners' appeal may be heard on the merits. The law must keep its promises.

Respectfully submitted February 4, 2010.

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EXHIBIT 4

Reproduced from

APPELLANTS-PLAINTIFFS' PETITION
FOR REHEARING EN BANC
Appeal No. 09-1173

Consisting of pages 5, 6 and 11 as copied from
Appellants-Plaintiffs' Opening Merits Brief

Petitioners' Opening Merits Brief P. 5:

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(3) Zone of interest test is "not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff" and is generally applied when "the plaintiff is not itself the subject of the contested regulatory action," *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (Sup. Ct. 1986). Since injured parties are subjects of contested agency action, this prudential consideration appears inapplicable, but, if applicable, injured parties' interests are arguably within the "zone of interests" meant to be protected or regulated by the Act in §§ 4(a)(1), 4(a)(5), 4(d), for complaint alleged injured parties had been adversely affected or aggrieved by agency action "within the meaning of, or zone of interests protected or regulated by, the Act, specifically 5A USC §§ 4(a)(1), 4(a)(5), 4(d) [n. 5 omitted]."

Petitioners' Opening Merits Brief P. 5 (Cont'd.):

II. Court of Appeals' Jurisdiction

Subject matter jurisdiction is attained by virtue of 28 USC § 1291 ("[t]he courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States"). Appeal is from a Memorandum of Law & Order entered by the District Court clerk as judgment in a civil case under Federal Rules of Civil Procedure 79(a).

III. Filing Dates

Petitioners' Opening Merits Brief P. 6:

Judgment, *supra*, was entered October 2, 2008. A timely motion to alter or amend judgment was filed October 17, 2008, which motion was denied November 10, 2008. A timely notice of appeal was filed January 9, 2009.

IV. Federal Rules of Appellate Procedure 28(a)(4)(D) Statement

Appeal is from a Memorandum of Law & Order entered as judgment that disposes of all parties' claims.

STATEMENT OF ISSUES

1. Was it reversible error when Judge Davis, taking no notice of injured parties' timely objection, granted an untimely Rule 12(b) motion to dismiss?

Petitioners' Opening Merits Brief P. 6 (Cont'd.):

Apposite cases:
Kontrick v. Ryan, 540 U.S. 443 (Sup. Ct. 2004); *Engelhardt v. Bell & Howell Company*, 299 F.2d 480 (8th Cir. 1962); *Petersen v. Chicago, Great Western Ry. Co.*, 3 F.R.D. 346 (D.C.D.Neb. 1943); *Beasley v. United States*, 81 F.Supp. 518 (D.C.S.C. 1948).

Appropriate constitutional, statutory provisions:
U.S. Constitution Amendment V; 28 USC § 1654.

2. Was it reversible error when Judge Davis relied on negligent misrepresentations of the material allegations made in the complaint in dismissing for want of standing?

Apposite cases:
Miller v. Ackerman, 488 F.2d 920 (8th Cir. 1973); *Warth v. Seldin*, 422 U.S. 490 (Sup. Ct. 1975); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (Sup. Ct. 1984); *Warth v. Seldin*, 422 U.S. 490 (Sup. Ct. 1975).

Appropriate constitutional, statutory provisions:
U.S. Constitution Amendment V; 5A USC § 4(a)(5).

Petitioners' Opening Merits Brief P. 11:

Clerk of District Court entered Judge Davis' Memorandum of Law & Order granting motion to dismiss with prejudice, *supra*, and denying motion to enter federal defendants' default and for judgment on the merits, *supra*, as judgment October 2, 2008.

Injured parties filed motion to alter or amend judgment October 17, 2008.

Federal defendants filed response memorandum in opposition to motion to alter or amend judgment, *supra*, November 3, 2008. Injured parties could not reply for Judge Davis' precipitate denial of motion to alter or amend judgment, *supra*, November 10, 2008.

Injured parties filed notice of appeal January 9, 2009.

Petitioners' Opening Merits Brief, Introductory P. 1:

SUMMARY OF THE CASE & REQUEST FOR ORAL ARGUMENT

Guy Heide, *et al.* ("injured parties") complained of injury in fact, economic or otherwise, from an Office of Inspector General U.S. Department of Transportation ("OIG") investigation. OIG ("federal defendants") filed a putative Rule 12(b) motion to dismiss, which asserted Inspector General Act of 1978 gave OIG "absolute discretion," thereby implying OIG officers or employees had discretion in law to inflict the injuries alleged in complaint.

Injured parties timely objected to the putative Rule 12(b) motion, *supra*, for violating inflexible claim-processing Rules, and, after particularizing this exception, argued federal defendants' "absolute discretion" claim, *supra*, was baseless and extravagant. Chief Judge Michael J. Davis, negligently misrepresenting the allegations in the complaint, improperly granted federal defendants' motion to dismiss. Questions presented:

1. Was it reversible error when Judge Davis, taking no notice of injured parties' timely objection, granted an untimely Rule 12(b) motion to dismiss?
2. Was it reversible error when Judge Davis relied on negligent misrepresentations of the material allegations made in the complaint in dismissing for want of standing?

Injured parties request fifteen minutes for oral argument pursuant to Fed. R. App. P. 34(a).